

April 23, 2008

BY ELECTRONIC MAIL

Robert C. Ashby
Deputy Assistant General Counsel
for Regulation and Enforcement
Department of Transportation
400 7th Street, SW, Room 10424
Washington, DC 20590-0001
Electronic Address: www.regulations.gov (Docket ID-OST-2007-26829)

**RE: Transportation for Individuals with Disabilities: Passenger Vessels
(73 Fed. Reg. 14,427)**

Dear Mr. Ashby:

The U.S. Small Business Administration's (SBA) Office of Advocacy (Advocacy) is pleased to submit the following comments on the Department of Transportation's (DOT) *Notice of Proposed Rulemaking on Transportation for Individuals with Disabilities*.¹ This rule is issued under the Americans with Disabilities Act (ADA), and aims to protect individuals against discrimination on the basis of disability in the service and policies utilized by passenger vessel operators. Advocacy commends DOT for holding a public meeting in April 2008 and reopening the comment period for this proposed rule.²

DOT has certified that this rule will not have a significant economic impact on a substantial number of small entities, pursuant to the Regulatory Flexibility Act (RFA).³ Based on input from the small business community, Advocacy recommends that DOT provide a factual basis for this certification or prepare an Initial Regulatory Flexibility Analysis (IRFA) on the impact of this rule on small entities.

Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The RFA,⁴ as amended by the Small Business Regulatory

¹ *Transportation for Individuals with Disabilities: Passenger Vessels*, 72 Fed. Reg. 2833 (Jan. 23, 2007).

² *Transportation for Individuals with Disabilities: Passenger Vessels*, 73 Fed. Reg. 14,427 (Mar. 18, 2008).

³ 5 U.S.C. § 601 et seq.

⁴ *Id.*

Enforcement Fairness Act,⁵ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

On August 13, 2002, President Bush signed Executive Order (E.O.) 13272,⁶ which requires federal agencies to notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. Under E.O. 13272, the agency must include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule.

Background

The U.S. Architectural and Transportation Barriers Compliance Board (Access Board) is an independent Federal agency that develops physical accessibility requirements that are implemented by other government agencies such as DOT. On November 2004, the Access Board published draft guidelines on accessibility applicable to large passenger vessels; these guidelines were later revised in 2006.⁷ The guidelines defined large vessels as passenger vessels which are permitted to carry more than 150 passengers, or more than 49 overnight passengers. At the same time, the Access Board also published an advance notice of proposed rulemaking (ANPRM) for small passenger vessels.⁸ The ANPRM defined a small passenger vessel as one which carried 150 or fewer passengers, or 49 or fewer overnight passengers.

On January 23, 2007, DOT released a Notice of Proposed Rulemaking (NPRM) that governs nondiscrimination by passenger vessel operators in their service and policies.⁹ DOT intends to address and adopt the Access Board's guidelines on physical accessibility and design requirements at a later time.¹⁰ As opposed to the Access Board's separate guidelines on large and small passenger vessels, this proposed rule will apply to all passenger vessels, regardless of size. On April 8-9, 2008, DOT held a meeting with stakeholders on this rulemaking, and reopened the comment period for this rule.¹¹

⁵ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

⁶ *Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking*, 67 *Fed. Reg.* 53461 (August 16, 2002).

⁷ *Americans with Disabilities Act (ADA) Accessibility Guidelines for Passenger Vessels; Large Vessels; Availability of Draft Guidelines; Notice of hearing*; 69 *Fed. Reg.* 69,244 (Nov. 26, 2004). *Americans with Disabilities Act (ADA) Accessibility Guidelines for Passenger Vessels; Reopening of comment period*; 71 *Fed. Reg.* 53,630 (Sept. 12, 2006). Advocacy submitted a comment letter in 2006 in response to these revisions. Comment letter from Thomas M. Sullivan, Chief Counsel, SBA Office of Advocacy, to the Access Board (Nov. 9, 2006) (*Advocacy Comment Letter*), available at: http://www.sba.gov/advo/laws/comments/atbcb06_1109.html.

⁸ *Americans with Disabilities Act(ADA) Accessibility Guidelines for Passenger Vessels; Small Vessels; Advance Notice of proposed rulemaking; notice of hearing*; 69 *Fed. Reg.* 69,245 (Nov. 26, 2004).

⁹ 72 *Fed. Reg.* 2833.

¹⁰ 73 *Fed. Reg.*14,427.

¹¹ *Id.*

Regulatory Flexibility Act Requirements

Under the RFA, when an agency proposes a rule, it must perform an IRFA, unless the agency can certify that the rule will not have a significant economic impact on a substantial number of small entities.¹² Under Section 605 of the RFA, a certification must include a statement providing a factual basis for the determination.¹³ At a minimum the factual basis should include: (1) identification of the regulated small entities based on the North American Industry Classification System; (2) the estimated number of regulated small entities; (3) a description of the economic impact of the rule on small entities; and (4) an explanation of why either the number of small entities is not substantial and/or the economic impact is not significant under the RFA.¹⁴

Alternatively, if an agency cannot properly certify the proposed rules then an IRFA must be developed and published in the *Federal Register* with a period for notice and comment. An IRFA must contain: (1) a description of the reasons why the regulatory action is being taken; (2) the objectives and legal basis for the proposed regulation; (3) a description and estimated number of regulated small entities; (4) a description and estimate of compliance requirements, including any differential for different categories of small entities; (5) identification of duplication, overlap, and conflict with other rules and regulations; and (6) a description of significant alternatives to the rule.¹⁵

Advocacy Recommendations

In this NPRM, DOT certified that this rule will not have a significant economic impact on a substantial number of small entities, but provided no factual basis for this determination.¹⁶ Under the RFA, an agency's reasoning and assumptions underlying its certification should be explicit in order to elicit public comment, as agency certifications are subject to judicial review.¹⁷ Consequently, certifications that simply state that the agency has found that the proposed or final rule will not have a significant economic impact on a substantial number of small entities are not sufficient under section 605(b).¹⁸

Advocacy believes that DOT's certification is not sufficient. This proposed rule impacts all passenger vessel operators, but DOT has not attempted to identify or estimate the number of passenger vessel operators that are affected by this rulemaking. DOT makes assumptions that there will not be a significant economic impact on these small entities in requiring nondiscriminatory service and policies, without any explanation or analysis. DOT states that this NPRM "focuses on prohibiting unnecessary practices that have discriminatory effects, such as extra charges and denials of transportation... [o]bserving such prohibitions will not have significant cost impacts on passenger vessel operators

¹² 5 U.S.C. §§ 603, 605.

¹³ 5 U.S.C. § 605.

¹⁴ *Id.*

¹⁵ 5 U.S.C. § 603.

¹⁶ 72 *Fed. Reg.* at 2843.

¹⁷ Advocacy, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act 10* (May 2003), available at: <http://www.sba.gov/advo/laws/rfaguide.pdf>.

¹⁸ *Id.*, at 11.

(PVOs).”¹⁹ DOT later references comments received in response to its ANPRM on this rule on November 29, 2004, stating that these comments indicate that many PVOs “already provide boarding assistance and other services to passengers with disabilities, so it is reasonable to assume that the passenger assistance provisions of the NPRM would not have large incremental costs.”²⁰ These assumptions do not provide an adequate factual basis for this certification. Moreover, Advocacy has spoken to small business stakeholders who listed a number of requirements in this rulemaking that may add significant costs for small entities.

Advocacy recommends that DOT provide a factual basis for its certification or prepare an IRFA on the impact of this rule on small entities as required by the RFA. Advocacy spoke to small business representatives, who gave the following feedback on the numbers of small entities that may be affected by this rule, and the possible economic impact of this rulemaking to these entities.

Numbers of Small Entities Affected

Advocacy believes that there are a substantial number of small businesses that are affected by this rulemaking. This proposed rule impacts all U.S.-flagged passenger vessels that carry passengers commercially. These vessels can be divided into three categories: (1) passenger vessels (vessels that are over 100 gross tons and are inspected by the U.S. Coast Guard (USCG), (2) small passenger vessels (vessels that are no more than 100 gross tons, carry more than 6 passengers for hire, and are USCG inspected) and (3) un-inspected passenger vessels (vessels that carry 6 or fewer passengers and are not USCG inspected).

According to the USCG, the agency inspected 5,985 small passenger vessels in 2004.²¹ There are many types of small passenger vessels, including ferries, excursion boats for sightseeing and dinner cruises, overnight cruise boats, fishing boats and dive boats.²² The Passenger Vessel Association (PVA) estimates that virtually all of these small passenger vessels are independently owned and operated by small businesses, using the SBA size standard of less than 500 employees.²³

The National Association of Charterboat Operators (NACO) has also estimated that there are over 16,000 recreational for-hire fishing boats.²⁴ Some of these vessels have a capacity of over 6 passengers and are inspected by the USCG; therefore there is an overlap between this number and the number of small passenger vessels cited above. Many of these vessels carry 6 passengers or fewer, and are not inspected by the USCG.

¹⁹ 72 *Fed. Reg.* at 2842.

²⁰ *Id.*

²¹ U.S. Department of Homeland Security, United States Coast Guard, *Report on Small Passenger Vessel Safety* 1 (Mar. 31, 2005).

²² *Id.*

²³ Telephone interview with Edmund B. Welch, Legislative Director, Passenger Vessel Association (PVA), in Alexandria, Va. (Apr. 16, 2008)(*PVA Interview*).

²⁴ Robert F. Zales, II, National Association of Charterboat Operators (NACO), *Impacts From Recreational For-Hire Fleets in the United States* 2 (Feb. 24, 2003).

NACO also estimates that virtually all of these recreational for-hire fishing boats are independently owned and operated by small businesses, utilizing the SBA size standard of less than 500 employees.²⁵

Cost Estimate for Small Entities

Advocacy spoke to small business representatives, who listed a number of requirements in this rulemaking that may add significant economic impacts for small entities.²⁶ These representatives stated that these potential impacts are due to DOT's one-size-fits-all approach that does not address the concerns of smaller passenger vessels. This is in contrast to the approach taken by the Access Board in creating different standards for large and small passenger vessels.

DOT seeks comment on "whether there should be any vessel size or capacity limits on any of the specific nondiscrimination provisions that are proposed in this NPRM with respect to subjects other than vessel accessibility standards."²⁷ Advocacy recommends that DOT consider vessel size or capacity limits on the specific provisions below that were suggested by small business representatives, which would provide flexibility and minimize the economic impact to these entities.

A) Section 39.25, Section 39.93, Limits on Numbers of Passengers with a Disability and Mobility Aids on Passenger Vessels

Section 39.25 states that "the Department views any policy limiting the number of passengers with a disability on a vessel as discriminatory on its face."²⁸ Section 39.93 notes that "passengers should be permitted to bring and use their own mobility aids and other assistive devices on board a vessel."²⁹ Small business representatives have suggested that DOT modify this policy to address the unique circumstances due to vessel size such as feasibility, safety and cost reasons.

DOT has not adopted the Access Board's physical accessibility guidelines for either large or small passenger vessels; many small vessels will not be able to accommodate feasibly certain passengers with disabilities and their mobility aids (such as wheelchairs) due to the size constraints of their vessels.³⁰ The National Marine Manufacturers Association (NMMA) also commented that there are safety concerns associated with this policy, as vessel operators are not at liberty to exceed U.S. Coast Guard or State-mandated weight capacity limits in order to

²⁵ Telephone interview with Robert F. Zales, II, President, National Association of Charterboat Operators, in Panama City, Fla. (Apr. 14, 2008)(*NACO Interview*).

²⁶ Advocacy spoke to NACO, PVA and the National Marine Manufacturers Association (NMMA) in April 2008.

²⁷ *Id.*

²⁸ 72 *Fed. Reg.* at 2836.

²⁹ *Id.* at 2841.

³⁰ See *Advocacy Comment Letter* for discussion of the Access Board's guidelines for large and small passenger vessels.

accommodate a disabled passenger and their mobility devices.³¹ Small entities are also concerned with the application of this mandate to smaller passenger vessels (for example vessels with the capacity of less than 6 passengers), because providing for disabled passengers on a small vessel would result in a decrease in the passenger capacity and a significant loss of income.³² Advocacy recommends that DOT provide clarifying language in this rulemaking to state that small passenger vessel operators may limit the number of disabled passengers that board their vessels for these unique situations.

B) Section 39.33- Advance Notice Provisions

DOT's proposal states that "it is never appropriate for a passenger vessel operator (PVO) to require a person to provide advance notice that he or she is coming, just because he or she has a disability."³³ However, DOT states that advance notice can be required when there is a group of 10 or more disabled passengers traveling as a group.³⁴ Small business representatives have recommended that this policy should be modified and the numbers lowered for small vessels, particularly uninspected vessels that only have a capacity of six passengers or less.³⁵ NACO representatives reiterate that there are concerns with the feasibility and weight limits for these small vessels, and these PVOs need to be able to require advance notice if there is even one disabled passenger that is reserving a seat.³⁶

C) Section 39.53- Accessibility of Reservation Services

DOT is proposing that PVOs have reservation systems that are accessible for disabled passengers, specifically requiring TTY service for persons with hearing impairments.³⁷ Small business representatives seek clarification on whether DOT is requiring these small vessels to purchase special TTY equipment or will allow PVOs to communicate with passengers via a telephone relay service (which will require no equipment and is free to users).³⁸ Advocacy recommends that DOT choose the option of allowing PVOs to communicate with passengers via telephone relay, as this minimizes the costs of this rule for small passenger vessel operators.³⁹

³¹ Comment letter from Cindy L. Squires, Esq., Regulatory Counsel, NMMA, to DOT (June 21, 2007).

³² *NACO Interview*.

³³ *72 Fed. Reg.* at 2837.

³⁴ *Id.*

³⁵ *PVA Interview*.

³⁶ *NACO Interview*.

³⁷ *72 Fed. Reg.* at 2839.

³⁸ *PVA and NACO Interviews*.

³⁹ Many of NACO's members operate small fishing vessels that utilize their cell phone as their reservation system, and passengers can speak to these operators when they are within range of a marina or leave a message on voicemail. NACO representatives stated that if DOT requires PVOs to purchase TTY equipment, this would also necessitate the purchase and installment of an expensive satellite phone. *NACO Interview*.

D) Section 39.103- Complaints Resolution Official

DOT also proposes that PVOs have a designated Complaints Resolution Official, and this person “would be the PVO’s expert in disability matters, knowledgeable about both the Department’s regulations and the PVO’s procedures, and able to assist passengers with disabilities and other PVO personnel in resolving issues.”⁴⁰ Both the PVA and NACO were concerned that this provision would be costly for small passenger vessel owners. Advocacy recommends that DOT clarify whether this provision will require extra personnel, training and/or paperwork burdens (such as any reporting or record retention requirements).

Conclusion

Advocacy is pleased to forward the comments and concerns of small businesses in the passenger vessel community on this rulemaking, particularly on the number of small entities that may be affected by this rule and the possible economic impacts to these entities. Advocacy recommends that DOT provide a factual basis for its certification or prepare an IRFA on the impact of this rule on small entities, as required by the Regulatory Flexibility Act.

Please feel free to contact me or Janis Reyes at (202) 205-6533 (Janis.Reyes@sba.gov) if you have any questions or require additional information.

Sincerely,

//signed//
Thomas M. Sullivan
Chief Counsel for Advocacy

//signed//
Janis C. Reyes
Assistant Chief Counsel for Advocacy

cc: The Honorable Susan E. Dudley, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget

⁴⁰ 72 *Fed. Reg.* at 2841.